IN THE MALAWI SUPREME COURT OF APPEAL SITTING AT BLANTYRE
MSCA CRIMINAL APPEAL NO. 13 OF 2015

[Being Criminal Case Number 65 of 2013, High Court of Malawi, Lilongwe Registry]

BETWEEN

MAXWELL NAMATA APPELLANT

AND

THE REPUBLIC

CORAM: THE HON. MR. JUSTICE R R MZIKAMANDA SC JA

THE HON. MR. JUSTICE L P CHIKOPA SC JA

THE HON. MR. JUSTICE A D KAMANGA SC JA

G Chipeta[Mr.] of Counsel for the Appellant

M Kachale[Mrs.] Director of Public Prosecutions/Malunda[Mr.] Principal State Advocate/Ms. Piriminta[Senior State Advocate] for the State

Chimtande Mrs. Court Clerk/Recording Officer

JUDGMENT

INTRODUCTION

The appellant was convicted by the High Court[the Trial Court] sitting at Lilongwe on two counts. One for Theft contrary to section 278 of the Penal Code and another for Money Laundering contrary to section 35(1)(c) of the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act[the Act].

The exact allegations are that in the months of June and August 2013 in the City of Lilongwe the appellant stole the sum of K14,439,966.50 property of the Government of Malawi[GOM] and secondly that he had, within the same time, in

his possession the above sum knowing or having reasonable grounds to believe that the same were proceeds of crime.

He was sentenced to three years IHL on the first count and five years on the second count. The sentences were ordered to run consecutively with effect from the date of conviction i.e. 21st January, 2015.

The appellant was dissatisfied with both convictions and sentences. He has appealed to this court.

GROUNDS OF APPEAL

Eight grounds were filed. We reproduce them verbatim.

1. *'That the learned judge erred in law and in fact in holding that the appellant had a case to answer at the end of the prosecution's case;*
2. *That the learned judge erred in law and in fact in holding that the appellant had fraudulently converted the sum of K14,439,966.50 being property of Malawi Government when the money given to the appellant was Bank's money and not Malawi Government money;*
3. *That the learned Judge erred in law and in fact in holding that the appellant has laundered the sum of K14,439,966.50 in the absence of any evidence that the appellant had possessed or concealed any money stolen from Malawi Government or any money believed to be proceeds of a crime;*
4. *The learned Judge erred in law and in fact in convicting the appellant in the absence of any evidence and as a result the same occasioned miscarriage of justice;*
5. *The learned Judge erred in law and in fact in convicting the appellant for both offences of theft and money laundering when the facts supporting the two counts were one and the same set of facts thereby leading to miscarriage of justice in that there was duplicity of convictions;*

6. *The learned Judge erred in law in imposing the sentences of 5 years for money laundering and 3 years for theft as the same are manifestly excessive;*

7. *The learned Judge erred in law and fact in ordering that the sentences of theft and money laundering were to run consecutively; and*

8. *The learned Judge erred in law and fact in holding that the appellant assumed the rights of the owner of a cheque for K14,439,966.50 by simply giving it to Cross Marketing Ltd and cashing the same when there was no evidence supporting such conclusion.'* **[Sic]**

FACTUAL BACKGROUND

There is a history to this matter. Some of it is still in contention before the courts. We will therefore, unless where such is unavoidable, not needlessly delve into the niceties thereof. We do not want to prematurely bind any courts to certain facts or conclusions of facts.

Suffice it to say for purposes of this judgment that the story about the appellant's convictions/sentences revolves around two cheques issued by GOM. Allegedly via the Ministry of Tourism[MOT]. One was for the sum of K14,439,966.50 and another for K9,739,154.29. Both cheques were issued in favour of Crossmarketing[the Company]. They were admitted into evidence in the Trial Court as Exh. P1 and P2 respectively. It is alleged that the first one was collected by the appellant, handed over to PW3, who was at all material times an employee of the Company, deposited into the Company's account maintained with Standard Bank Lilongwe Branch, liquidated and the proceeds shared between the appellant and the Company. The second cheque was allegedly treated in much the same way. It was deposited in the same account as the first one. Its proceeds were also allegedly shared between the appellant and the Company.

In the view of the State and the Trial Court the above conduct amounted to theft and money laundering. Hence the above charges, convictions and sentences.

THE LAW

A lot of law was referred to by the parties both in this and the Trial Court. We can only be thankful. We however do not think that we should refer to all of it at this stage. We would rather, except where necessity leaves us with no option, do so while we debate and decide on the questions raised in this appeal. Accordingly we will, at this stage, make reference to statements of law that we think are not in much dispute, if at all, and are regarded, certainly by us, to be of general application.

Firstly therefore we reiterate the point that in determining this appeal we will ask ourselves the question whether on the facts and law before the Trial Court and now before us we would have come to the very conclusions arrived at by the said Court. If the answer be in the positive in all material aspects the appeal will fail. If however the answer be wholly or in part in the negative, the appeal will succeed either wholly or to the extent of the negative responses. See also **Gadabwali v R** where Chipeta JA said:

> *'.... Appeals like this one come to this Court by way of rehearing. .. Of necessity, therefore, this entails that I treat the matter as if it was coming before me for the first time. This means allowing myself to look at the very material the Honourable Judge looked at in the Court below before he came to his decision, and assessing the same myself to see whether I could have come to a different decision'.* [Sic]

Secondly, we remind ourselves of section 5 of the Constitution which we here quote in full.

> *'Any act of government or any law that is inconsistent with the provisions of this Constitution shall, to the extent of such inconsistency, be invalid'.*

Thirdly, we restate what, in our judgment, we consider obvious namely that those that proceed with criminal trials in disregard of the Constitution do so at their great peril. Why? Because whereas before 1994 the CP&EC was the alpha and omega of criminal procedure and practice in Malawi the same cannot be presently. Now there is a Constitution perspective to contend with. The High Court said as much in **Witney Douglas Selengu v Republic** Criminal Appeal Case Number 26 of 2004 [High Court of Malawi Mzuzu Registry, unreported] and **R v Given Visomba**

Confirmation Case Number 627 of 2007[High Court of Malawi, Mzuzu Registry, unreported]. They are sentiments we adopt.

Fourthly, and on the pain of being repetitive, we reiterate the fact that in criminal matters the burden is always on the State to prove its allegations beyond reasonable doubt. The accused has no obligation to prove his/her innocence. Where therefore there is at the close of a prosecution doubt as to an accused person's guilt the doubt will always be resolved in favour of the accused by way of acquittal.

Perhaps the best exposition of what amounts to proof beyond reasonable doubt is to be found in **Miller v Ministry of Pensions** [1947] 2 All ER 372 at 373 where the venerable Denning J[as he then was] said as follows:

> *'that degree[of proof beyond reasonable doubt] is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is probable, but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice.'*

In this jurisdiction we think the sentiments of Mwaungulu J[as he then was] in **Mputahelo v R** [1999] MLR 222 at page 252 deserve special mention. He said:

> *'in criminal cases the standard of proof has always been and remains to be proof beyond reasonable doubt. The court should examine the whole matter before it and decide whether on the case as a whole the State has discharged that duty. The defence case must be considered and treated like the prosecution case. The prosecution case should be so formidable that in the face of it the defence pales. The reverse is also true. A trial court, however, should not think that the prosecution's case is made out simply because the defence is weak or unreasonable. That is tantamount to placing the burden, which is always on the State, on the defence to prove*

the case beyond reasonable doubt. Even if the defence case is untenable the trial court must, to satisfy itself that the State has discharged the duty, approach the State's case with the rigour the burden and standard of proof require'.

Fifthly, we also find it important to point out that our Constitution has specified the kind of criminal trials Malawi must have, the calibre of persons who must preside over them and the manner in which they should preside. According to section 42(2)(f) of the Constitution Malawi can only have what the Constitution has described as **fair trials**. As to what amounts to a fair trial paragraphs (f) and (g) of section 42(2) have essayed a description. Our trials must therefore *inter alia* ordinarily be held in public within a reasonable time after an accused has been charged; the accused must be informed with sufficient particularity of the charge[s] against them; the accused must be presumed innocent and has the right to silence during plea taking and the duration of the trial; the accused must also be allowed to adduce and challenge evidence. The trials themselves must only be presided over by independent and impartial courts *'in an independent and impartial manner with regard only to legally relevant facts and the prescriptions of the law'*. See section 9 of the Constitution.

Sixthly we should emphasise what is now also trite namely that if an accused opts to exercise their right to silence this will not be an indication, one way or the other, of their guilt. See section 42(2)(a), (c) and (f)(iii) of our Constitution. The foregoing is in contrast to the law as it was before 1994 where under the then section 256(1) of the CP&EC, now somewhat rehashed into section 256(2) of the CP&EC, the State was allowed to comment on an accused person's silence and a court permitted to take an accused's silence into account in determining their guilt. A case, if we may say so, of silence being equated to an admission of guilt.

Where however an accused decides to testify or gives an explanation the court's approach to the accused's story should never be 'is the accused's story true or false?' resulting, if the answer were false in a finding that the accused must be taken to have been lying. The proper question to be asked is 'is the accused's story true or might it reasonably be true?' with the result that if the accused might

reasonably be telling the truth then she in fact is. See **Gondwe v R** 6 ALR Mal 33 at 37.

Seventh, it is important to note that our criminal justice system is adversarial. This we say to differentiate it from, for instance, the investigative style obtaining in parts of continental Europe. The Malawian court's role is therefore in many ways akin to that of a soccer referee. Intervening only where it is necessary but otherwise content to watch the protagonists go after each other and the ball while at all times ensuring that the rules of the game are complied with. They watch over the proceedings while the State tries to prove its allegations against the accused beyond reasonable doubt. They ensure that the rules of engagement are complied with and intervene only for good cause. This is so so none is left in any doubt whatsoever as to the Court's independence and impartiality. Sections 9 and 42(2)(f) of the Republican Constitution refer.

Eighth and with respect to appeals against sentences appellate courts will not interfere with a sentence merely because they would have imposed a different sentence if they were the Sentencing Court. They do that only when they are certain that the sentence is manifestly excessive or inadequate or is wrong in law and/or principle. See **R v Ndove** 1923 - 60 ALR Mal 941.

THE ISSUES

Proceeding from the grounds of appeal this appeal, in our view, raises three broad issues. Firstly there is the matter of procedure. The appellant contends that the charges and therefore the convictions are defective. Specifically that the charges/convictions are on the one hand duplicitous for being based on the same facts and on the other bad for want of sufficient particularity. Then there is the matter of section 201 of the CP&EC. The appellant's question being whether the Trial Court proceeded properly by, of its own volition, summoning a witness namely one David Kandoje PW5.

Second is the challenge against the convictions. Again there are two sides to the challenge. First that the Trial Court misdirected itself in law in holding that the appellant had cases to answer at the close of the prosecution's cases and secondly

that there is no evidence to justify conclusions of cases to answer or the convictions themselves.

Third are the sentences. The appellant contends that they are improper for being manifestly excessive in the main because they were made to run consecutively.

THE PARTIES' ARGUMENTS

PROCEDURE

Alleged Duplicity

The appellant contends that the charges and therefore the convictions against him are bad for duplicity. They are based on the same facts. It makes no sense that he should on their basis be charged on two counts except to the unwelcome extent that it embarrassed his defence and allowed the prosecution to secure a longer than justified sentence. To illustrate the point the appellant argues that the money laundering charge depended on him having committed and been convicted of the offence of theft. There was therefore no need to charge him with both theft and money laundering. The better thing, in his view, was for the State to charge him with only one offence. To proceed as the State did was to persecute him.

So when is a count bad for duplicity? It is when the particulars of an offence allege more than one offence. In the instant case the appellant was charged as follows:

> *'COUNT 1*
>
> ***Statement of Offence***
>
> *Theft contrary to section 278 of the Penal Code*
>
> ***Particulars of Offence***
>
> *Maxwell Namata in the months of June and August 2013 in the City of Lilongwe stole K24179120.79 the property of Malawi Government*
>
> *COUNT 2*
>
> ***Statement of Offence***

Money Laundering contrary to section 35(1)(c) of the Money Laundering Proceeds of Serious Crime and Terrorist Financing Act

Particulars of Offence

Maxwell Namata and Luke Kasamba in the months of June and August 2013 in the City of Lilongwe had in their possession K24179120.79 knowing or having reasonable grounds to believe that the said property were proceeds of crime'[Sic]

The appellant clearly has a misapprehension of duplicity. Duplicity does not come about because an accused has been charged with two counts on the same facts. Only because particulars of the offence she is charged with disclose more than one offence. In so far as therefore he contends that the charges[and therefore the convictions] are bad for duplicity because they emanate from the same set of facts his argument has no leg to stand on.

Actually, and from a practical prudence perspective we think it only proper that the State proceeded as they did. The money laundering prosecution was clearly dependent upon proof that the money in issue derived from the theft alleged in count one. While therefore it might not be imperative that the theft be prosecuted and a conviction secured there are, in our judgment, more positives to be had from proceeding in the manner the prosecution did than not. It is easier to conclude money laundering following a conviction of theft than essaying to do the same in the absence of one.

Just in case there are any lingering doubts we will confirm going through the cases cited in support of not charging and prosecuting both the predicate offence and money laundering. More importantly the case of **R v GH[Respondent]** [2015] UKSC 24. We think, with respect, that they have more to do with convenience than the strict application of legal principle. True there was a suggestion that a court should be willing to use its powers to discourage the practice complained of by the appellant. What was called inappropriate use of penal provisions. We are reluctant, for reasons to do with the separate functions of the Courts and the Director of Public Prosecutions as set out in our Constitution[which we also touch on hereinafter] to do as the English courts have done. We therefore remain unable

to agree that the charging and conviction of the appellant of theft and money laundering on the same facts is bad for duplicity. True it may lead to longer than justifiable sentences. But the cure, in our view is not not to charge/prosecute. It is to appropriately address the sentencing court.

Aside from the above we feel obliged to make two observations. Firstly that the second charge is actually bad for duplicity. But from a perspective other than that raised by the appellant. The particulars allege that the appellant and one Kasamba had in their possession the sum of K24179120.79 *'knowing or having reasonable grounds to believe that the said property were proceeds of crime'*[Sic]. There are two allegations in the particulars. Either the accused persons knew or they had reasonable grounds to believe. Each allegation is, in our most considered opinion, a stand-alone offence. Lumping them together as was done was to proceed wrongly. It made the count bad for duplicity.

This might have arisen out of the State not being sure which way their evidence was going to fall. Or trying as best as they could to, in a manner of language, hedge their bets. There was a better way to go about it if such were the State's concerns. It was to put the allegations in the alternative. The allegation would then have been either that the accused knew or had reasonable grounds to believe that the money in issue was proceeds of a crime.

We pondered over what effective remedy to give to the appellant. The cases of **Mijiga v Rep** Cr. App. No. 100 of 1973 Mal, [unreported], **Ndau v Rep** Conf. Case Number 80 of 1975 Mal, [unreported] and **Rep v Dambuleni** Conf. Case Number 1181 of 1973 Mal, [unreported] held that duplicity is not an infraction to warrant the setting aside of a conviction. It does not ordinarily result in an accused suffering an injustice. They felt this is a proper case in which section 5(1) of the CP&EC should be resorted to.

We have hereinafter discussed sections 3 and 5 of the CP&EC. In relation to the instant duplicity we have no doubt that the appellant did not suffer any injustice. He was at all material times aware of exactly what the money laundering charge was all about namely that he was in possession of a specified sum of money in circumstances in which he was aware or should have been aware that the same

were proceeds of crime. The defect is therefore cured by the application of section 5 of the CP&EC. To conclude otherwise would be equal to paying undue regard to technicalities.

The second observation concerns section 35(1) and (2) of the Act. It reads:

> *'(2) for purposes of proving of the money laundering offence under subsection 1, it is not necessary that the serious crime be committed.'*

We found it rather incongruous that section 35(2) can talk of money laundering in the absence of proof that the crime the proceeds of which are the subject of the money laundering charge was actually committed. As the Trial Court rightly observed on page 21 of its judgment money laundering arises because of a need to sanitise dirty money. The money is dirty because it is the proceeds of crime. In the absence of the crime there should not be any proceeds of crime to be laundered. There should be no money laundering at all. It should be impossible to talk of proceeds of crime in the absence of the crime itself.

We would of course understand if the subsection were talking of there being no need to secure a conviction in relation to the serious crime. Money laundering is a standalone offence. It is therefore enough to ground it if the State proves that the property derived from a serious crime without having to secure a conviction.

<u>An Alleged Lack of Clarity</u>

Before the 1994 Constitution issues of clarity of charges were dealt with by making reference to *inter alia* sections 126 and 128 of the CP&EC. A charge was therefore required to have the charging section, a statement of the offence charged and the particulars thereof in ordinary language.

Since the advent of the 1994 Republican Constitution there has been introduced a constitutional dimension which the prudent prosecutor does well to give precedence to in view of section 5 of the Constitution. Under section 42(2)(f)(ii) of the Constitution the prosecution is obliged to inform an accused of the charge[s] against them with *sufficient particularity*. What amounts to sufficient particularity varies from case to case. In **R v Carton Mphande** Confirmation Case Number 477 of 2007, High Court of Malawi, Mzuzu Registry[unreported] the Court had something

to say about 'sufficient particularity. It held that 'sufficient particularity' went beyond telling the accused the charge[s] against them. It includes the provision of witness statements, witness names and their addresses at such a time, before the commencement of proceedings, as would not only allow him know the nature of the case[s] against him but also not negatively affect his ability to prepare and mount a proper defence. We hold similar sentiments.

So what exactly is the appellant's complaint? It is not about the statements of offences. We doubt whether anyone could have bettered the State's *'Theft contrary to section 278 of the Penal Code'* and *'Money Laundering contrary to section 35(1) of the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act'*. It is about the particulars of the Theft charge. He contends that the State should have done more than just allege that the appellant *'stole K24,179,120.79 the property of Malawi Government'*. That the particulars should have specified the particular ministry, department of the GOM and exact location from where the money was stolen lest the geographical and operational expanse of GOM mislead him. That because the foregoing was not done the charge must, to that extent, be taken to have been defective for want of sufficient particularity.

We understand the appellant's concern. We actually would support a charging that specified the government department, ministry and exact location from where the money was allegedly stolen. We will however also be the first to acknowledge that the foregoing would present practical problems in the instant case. Take for instance an allegation that the money was stolen from the Ministry of Foreign Affairs. How do the particulars deal with the separate facts that the money while allegedly stolen from the Ministry of Foreign Affairs was the property of the GOM? Do the particulars also take into account the geographical and operational expanse of the ministry by, for instance, alleging that the money while being property of GOM was stolen from the Ministry of Foreign Affairs' offices at Capital Hill? Or in Blantyre? That would make for unwieldy particulars. Ones which while intended to maximise clarity would actually achieve the opposite while simultaneously opening unnecessary battlefronts.

The practical reality, if we might say so, is that the money in issue belonged to the generic body known as Government of Malawi. That is what should be stated in the

particulars of the offence. As to the exact ministry, department, government agency and geographical location we think that should be left to disclosures and, where possible, the State's opening address.

In the Trial Court the appellant was provided with not just the charges against him but also a list of witnesses, their particulars and their evidence. The prosecution also favoured the Trial Court, and naturally the appellant, with an opening address. From all of them it was clear from which Ministry/Department the State believed the money was stolen. We are, with respect, unable to agree with the appellant that he was not sufficiently informed of the charges against him. Or, in the alternative, that the theft count was bad for want of sufficient particularity.

<u>An Alleged Misapplication of Section 201 of the CP&EC</u>

The record shows that on page 54 line 5 the State closed its case after the testimony of PW4 Police Officer Chiwanda. The Trial Court then of its own volition but purportedly acting under section 201 of the CP&EC, decided to call Mr Kandoje who was, at all material times, the Accountant General of the Republic of Malawi as a witness. The question being 'did the trial court thereby proceed properly?'

Section 201 of the CP&EC provides as follows:

> *'(1) Subject to subsection (2), any court may, of its own motion at any stage of any inquiry, trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine any person already examined or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.*
>
> *(2) The Prosecution or the accused or his legal practitioner shall have the right to cross-examine such person, and the court shall adjourn the case for such time, as it thinks necessary to enable such cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of such person as witness.*

(3) In exercising the powers conferred on it under subsection (1), the court shall be governed by the interests of justice and, in particular shall avoid taking over the prosecution of the case'.

It is fair to say that Counsels for both the State and the appellant reacted, albeit timorously, to the Trial Court's decision to proceed as it did. Counsel for the appellant said it was his hope that Mr Kandoje was not being called for purposes of filling gaps in the State's case. The State on the other hand said it was:

'satisfied that it has made out its case it will stand by the evidence so far before this court and only hope that Mr Kandoje is being subpoenaed by the court in the interests of justice otherwise we are done' **[Sic]**.

See paragraphs 2 and 3 on page 54 abovementioned and lines 1 and 2 on page 55 of the court record.

We will make a few observations.

Firstly, and while we do not want to sit here and pretend to interpret what the State was at, it is obvious that the State was not keen on Mr Kandoje. It was sure it could get by without his testimony. That explains its decision not to include him in its list of witnesses from the word go.

Secondly, we remind ourselves that in Malawi it is for the prosecution to prosecute. How they do that is their business as long as they abide by the law and best practice. There is therefore no denying the fact that it is for the prosecution, and with the greatest respect never for the Trial Court, to decide when to close their case. In **R v Damson** 1923-60 ALR Mal 526 at 527 Spencer-Wilkinson CJ said:

'it must be left to the prosecuting officer to decide when he will close his case and he must take the responsibility if at that stage there is insufficient evidence to support a conviction'.

Thirdly we consider it trite that upon the prosecution closing its case the obligation on the Trial Court is to, in terms of section 254 of the CP&EC, decide

whether or not a case has been sufficiently made out requiring the accused to enter a defence.

Fourthly, and equally trite is the fact that a Trial Court can only resort to section 201 where it is essential to the just decision of the case, is in the interests of justice and does not amount to the court taking over the prosecution of the case[**emphasis supplied**].

So when and how does a Court resort to section 201? On the face of it section 201(1) suggests that a Court can resort to section 201 at any stage of a trial. With respect *at any stage* cannot, literally, mean *at any stage*. It would, for instance, not be a very clever Court that called its own witness as PW1. It would be a similar Court that called its own witness[es] notwithstanding an accused person's decision to exercise their right to silence and not to call witnesses. That would be an unjustifiable interference with the accused person's right to silence and not to call witnesses.

In **Chiwaya v Rep** 1966-68 ALR Mal 64 the Court held that section 201 should be used sparingly and for reasons which should appear clearly on the record. **R v Damson** held that the section should not be used to permit a Trial Court, immediately after the prosecution has closed its case, to call a witness in order to establish a *prima facie* case against the accused. In **R v Raphael** 1923-60 ALR Mal 377 at page 380 Spencer-Wilkinson CJ thought it improper to call for additional evidence after the closure of the defence.

Going by the above precedents, the law and being conscious of the new constitutional dispensation we are of the view that section 201(1) must, except for very cogent reasons which must appear on record, be resorted to not just sparingly but most preferably before the prosecution has closed its case. Exactly when between the opening of the trial and the closure of the prosecution's case is up in the air. Suffice it to say that if we allowed a Court to liberally resort to section 201(1) more so after the close of the prosecution's case an impression would be created that the Court is reopening the State's case with a view to patching it up. A circumstance in which a Court should never find itself. It flies in the face of section 42(2)(f)(i) as discussed above, the sentiments of Spencer-Wilkinson CJ in **R**

v **Damson** and is tantamount to the Trial Court taking over the prosecution of the case.

It is also improper for a Trial Court to merely inform the parties that it will call a witness of its own and thereafter proceed to do so. Rather it should notify the parties of its intention to do so, the reasons therefor which same should be recorded and give the parties a chance to say their bit on whether or not the court should so proceed. Then and only then should the Court rule which way it wants to go. This not only provides ample evidence of fairness, independence, impartiality and transparency it also allows a superior court sitting on appeal or review to understand why a trial court proceeded like it did and to decide whether or not to agree with such course of action.

In the matter before us the Trial Court only thought of calling its own witness after the State had closed its case. It never said, on record or otherwise, whether that was in the interests of justice or essential for the just decision of the case. It actually gave no reason[s] for doing what it did. It never even gave the parties a chance to be heard on whether it was necessary that Mr. Kandoje testifies. The Trial Court thereby erred. It exposed itself to suggestions of reopening, patching up and taking over the conduct of the State's case. It, in our view, thereby conducted itself in a manner that called into question its own independence, impartiality and therefore the fairness of the whole trial.

The long and short of it all is that the Trial Court misapprehended and misapplied section 201. Mr Kandoje should never have been allowed anywhere near the witness stand. His evidence was/is inadmissible. The Trial Court should have proceeded to determine this case without paying any regard to it. As we will not do.

THE CONVICTIONS

Two broad issues were raised by the appellant. Firstly that the *prima facie* cases against him were without merit and secondly that there was no evidence warranting findings of guilty against him.

Were *Prima Facie* Cases Of Theft And Money Laundering Established Against The Appellant?

In so far as the law is concerned both parties proceeded from the same hymn sheet. It is the spin they put to it that sent them in different directions. They agree that in terms of section 254 of the CP&EC it behoves a Trial Court at the close of the prosecution's case to decide whether or not a case has been made out against an accused sufficiently to require him to enter a defence. In **R v Zain Phillips & Others** Criminal Case Number 49 of 2012(HC)(unreported) Mbvundula J. said:

> *'the test is as follows. A court must find that there is no case to answer if there has been no evidence to prove the essential elements of the alleged offence or if the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no tribunal could safely convict on it.'* [Sic]

See also **Namonde v Rep** [1993] 16(2) MLR 657, **Mputahelo v Rep** [supra] and **Rep v Alice Joyce Gwazantini** Criminal Case Number 208 of 2003 all of which are to the same effect.

Proceeding on the above law the appellant contends that there was, at the close of the prosecution's case, no *prima facie* case established against him on either count. Specifically the appellant referred to page 4 of the Trial Court's ruling where it said it had:

> *'carefully analysed the evidence proffered this far by the prosecution in the light of sections 278 of the Penal Code and 35(1)(c) of the Money Laundering Act as well as the submissions filed by Counsel for both accused persons. Upon this consideration we find that the prosecution have sufficiently made out a case for the 1st accused person to enter his defence on the charges of Theft and Money Laundering ..... accordingly in terms of section 254(2) of the Criminal Procedure and Evidence Code'* [Sic]

Firstly he contends that the Trial Court did not set out how it had so analysed the prosecution's evidence as to arrive at the conclusion that there were *prima facie*

cases against him. Secondly that there was in fact no evidence to warrant such conclusions.

The State disagrees. Firstly it believes there was enough evidence to justify findings of cases to answer against the appellant on both counts. Secondly, and in relation to section 254, the State is of the opinion that the section only obliges a Trial Court to make a finding of whether or not there is a case for the accused to answer. It does not require that the Court sets out its analysis of the evidence and give reasons for its findings beyond saying the evidence was such as to convince it that a *prima facie* case had been established. In the instant case it is therefore enough that the Trial Court set out and applied the correct standard of proof for its findings of a case to answer.

The State also took time to warn us of the dangers of a trial court giving a detailed analysis of the evidence in a ruling of a case to answer. Or giving reasons therefor. We were asked to take Judicial Notice of the cases of **R v Friday Jumbe & Phillip Bwanali** and **R v Mc Donald Kumwembe & Others** then before the High Court Lilongwe Registry where the accused persons applied for a recusal of the trial judges on the basis that a detailed analysis of the evidence in their rulings of cases to answer meant that the courts had predetermined the cases' final outcome. It might, as we understood the State, therefore be better that trial courts refrain from detailed analyses of the evidence when exercising their section 254 powers. But just in case we are minded to find that the Trial Court erred by not giving out a detailed analysis of the evidence and the reasons for its conclusions we were asked to cure the error by resorting to sections 3 and 5 of the CP&EC.

Section 3 obliges the courts to do substantial justice without undue regard for technicality. The essence of section 5 is that no finding, sentence or order by a court of competent jurisdiction shall be set aside unless it occasions a failure of justice. In the instant case the State thinks the lack of a detailed analysis of the evidence or reasons is a mere technicality. It could not have occasioned any injustice to the appellant. A technicality that was cured by the Trial Court delivering, at the end of the trial, a well-reasoned judgement outlining how the State had now proved its case beyond reasonable doubt the fact that the appellant

had a go at discrediting it notwithstanding. The respondent therefore prays that we uphold the Trial Court's findings of cases to answer against the appellant.

We have four preliminary matters to deal with.

Firstly it is less than proper for the State to warn us about *prima facie* rulings via the cases of **R v Jumbe & Another** and **R v Mc Donald Kumwembe & Others**. These cases were on the date of the hearing of this appeal still ongoing before the High Court. What the State brought to our attention are therefore not the High Court's final decisions about the impropriety of rendering detailed rulings on *prima facie* cases but the accused persons' complaints, not appeals, against such kind of rulings. Complaints are not precedent. This Court, indeed any court, cannot be expected to proceed in a particular fashion merely because a complaint, and we daresay even an appeal, has been registered against such course of action in another case.

Secondly, and about the application of sections 3 and 5 of the CP&EC it is our most considered view that the above sections must only be used in relation to errors of a technical nature. And where they must be used it is not enough for the State to stand up, allege that the error is of a technical nature, or that it has not occasioned an injustice to the accused, sit down and hope that the court will agree with them. The State should show, literally beyond doubt, why such is the case. The accused will of course be given a chance to respond.

Thirdly, and if only to set the record straight, a Court's compliance with section 254 is a matter of law. It is no technical matter. Where a trial court fails to comply with section 254 a superior court will not rectify the error by resorting to sections 3 and 5 abovementioned. It will instead do that which the said Court should have done under section 254 namely ask itself the question whether the evidence before the Court was at the close of the prosecution's case such as to establish a case to answer against the accused. And if a trial court mistakenly found a case to answer the appellate court will disregard whatever happened after the erroneous finding and acquit the accused for having no case to answer. See **Rep v Makhanjima** Confirmation Case Number 1811 of 1977 Mal [unreported] where the court held that a trial court's mistaken finding of a case to answer could not be remedied by

the introduction, in the course of the defence, of evidence which told against the accused. See also **R v Mtende Msukwa** Confirmation Case Number 115 of 2000, High Court of Malawi, Mzuzu Registry[unreported]. The State's proposition that the erroneous finding of a case to answer can be cured by resorting to the combined application of sections 3 and 5 of the CP&EC is clearly without basis in law.

Fourthly, we should reiterate that section 254 only obliges a trial court to make a finding whether or not a *prima facie* case has been made out. It does not specify a fashion in which this should be done. Except where the court is acquitting in which case sections 139 and 140 of the CP&EC must be complied with. The foregoing is not to say that it is wrong to give reasons for such opinion. Or to analyse the evidence leading to such conclusion. Just that it is not by itself an error to fail to give a detailed analysis of the evidence leading to a finding of a case to answer. Or the reasons therefor.

Coming back to the appellant's arguments it is clear that the first part is about form. He contends that the Trial Court neither set out how it analysed the evidence before it to conclude nor gave reasons for concluding that there were *prima facie* cases against him.

The law, as we have said above, does not prescribe how a ruling of a case to answer should be crafted. Only that a trial court should say whether or not it has, on the evidence before it, found one against the accused. The Trial Court did as the law obliged it to. In so far as therefore the appellant's argument is based on form it is without merit.

The other side is that there was at the close of the prosecution's case no evidence to ground findings of *prima facie* cases against the appellant. We have gone through the evidence and law before the Trial Court at the close of the prosecution's case. And the case law now before us. We should specifically mention the case of **R v Dzaipa** (1975-77) 8 MLR 307. It is of relative antiquity. Therein the guiding principle in relation to findings of a case to answer was put as follows:

> *'the decision at this stage of the proceedings should depend not so much on whether the adjudicating tribunal(if compelled to do so) would at this*

stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it there is a case to answer'.[Sic]

So, what evidence was before the Trial Court at the close of the prosecution's case? Subject to what we say hereinafter it was that two GOM cheques, one in the sum of K9,739,154.29 and another in the sum of K14,439,966.50, were made out in favour of the Company; that the first cheque was allegedly given to the Company by the appellant via one Luke Kasamba, then a co-accused and the second through PW3; that these cheques were deposited into the Company's account and the proceeds allegedly shared between the appellant and the Company. There were also allegations that there was no contract between the Company and GOM or the appellant and GOM warranting the issuance of the cheques. Was that evidence enough to ground findings of cases to answer against the appellant for theft and money laundering?

We are of the view yes but only in relation to the second cheque. There was no evidence connecting the appellant to the first cheque. Not at the close of the prosecution's case nor, as the Trial Court itself found, at the conclusion of the trial. We are aware that the then co-accused, Luke Kasamba, said he got the said cheque from the appellant. But this was in an extra judicial statement by a co-accused. A statement that was never adopted by the appellant. It should not have been used against the accused/appellant.

We are also aware that PW3, one Makungwa, told the Trial Court that Kasamba said he got the cheque from the appellant. That, as the Trial Court said, is hearsay evidence. It was/is inadmissible. It is obvious that when the Trial Court found a case to answer in relation to the first cheque it did so on the basis of evidence that included that which was inadmissible. Had the Trial Court disregarded the above two pieces of inadmissible evidence it would have come to the obvious conclusion that there was no case to answer against the appellant in respect of the K9739154.29 cheque. To the extent that it did not the Trial Court erred. The appellant's protestation against a finding of a *prima facie* case against him succeeds but only to the extent of the sum of K9,739,154.29.

Is The Appellant Guilty Of Theft?

Put differently was the evidence before the Trial Court such as to prove beyond reasonable doubt that the appellant stole the sum of K14439966.50 property of GOM?

By way only of reminder the appellant was charged with theft of K24,179,120.79. He was convicted of theft of K14,439,966.50 which are the proceeds of the second cheque. This appeal is therefore only in respect of the K14,439,966.50 cheque.

The Law

Theft in this jurisdiction is a creature of statute. It is defined in section 271 of the Penal Code in the following terms:

> *(1) 'A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, is said to steal that thing.*
>
> *(2) A person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he does so with any of the following intents, that is to say-*
>
> *(a) an intent permanently to deprive the general or special owner of the thing of it;*
> *(b) an intent to use the thing as a pledge or security;*
> *(c) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;*
> *(d) an intent-to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;*
> *(e) In the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner.*

The term "special owner" includes any person who has any charge or lien upon the thing in question, or any right arising from or dependent upon holding possession of the thing in question.

(3) When a thing stolen is converted, it is immaterial whether it is taken for the purpose of conversion, or whether it is at the time of the conversion in the possession of the person who converts it. It is also immaterial that the person who converts the thing in question is the holder of a power of attorney for the disposition of it, or is otherwise authorized to dispose of it.

(4) When a thing converted has been lost by the owner and found by the person who converts it, the conversion is not deemed to be fraudulent if at the time of the conversion the person taking or converting the thing does not know who is the owner, and believes on reasonable grounds that the owner cannot be discovered.

(5) *A person shall not be deemed to take a thing unless he moves the thing or causes it to move'*.[Sic]

In somewhat simpler language one commits theft who (a) with a fraudulent intent, (b)without a claim of right (c) takes anything capable of being stolen. See **Esther Kathumba & 3 Others v R** MSCA Criminal Appeal Number 21 of 2006[unreported]. One also commits theft who *fraudulently converts to the use of a person other than the owner anything capable of being stolen*[emphasis supplied].

The Arguments

We will start with the Trial Court's, proceed to the appellant's and conclude with the State's.

The Trial Court's

The Trial Court found no evidence of the appellant having taken the cheque or the K14,439,966.50. It therefore refused to conclude that the appellant stole by taking

the cheque or its proceeds. On page 295 of the record[page 16 last paragraph of its judgment] the Trial Court said:

> *'the evidence before us does not disclose how this cheque was found with the 1st accused person and it definitely is not our duty to delve into the realm of speculation of how he came to possess the cheque made payable to Cross Marketing Ltd. In terms of the first limb of section 271 of the Penal Code, to sustain the charge of theft, the evidence ought to have shown that the 1st accused fraudulently and without a claim of right took the cheque. Without any evidence of the circumstances under which the cheque was taken by the 1st accused person, we cannot safely conclude that he fraudulently took the same.'*[Sic]

The Trial Court however concluded that there was evidence beyond doubt that the appellant stole the cheque and its proceeds by *fraudulently converting* the same to a person other than the owner namely GOM. Its sentiments on page 18 paragraph 3 and page 20 paragraph 2 of its judgment give an insight on how it came to such conclusions.

> *'as we have mentioned above, the prosecution have not led evidence of how the 1st accused person came into possession of the cheque. The most we can find is that on the basis that the Ministry of Tourism did not award any contract to the 1st accused person or Cross Marketing Ltd, neither the 1st accused person nor Cross Marketing had any claim of right to the two cheques in issue.*
>
> *As noted above, the evidence does not disclose clearly how the 1st accused person came into possession of the cheque. It is clear though that he had no claim of right to it having not rendered any service nor entered into any contract with Ministry of Tourism. Notwithstanding how the 1st accused person came into possession of the cheque, we find that he fraudulently converted the same to his and the 2nd accused person's use. This we find by virtue of the fact that the 1st accused person came into possession of the cheque and assumed the rights of the owner, Malawi Government, by giving the same to the 2nd accused person to deposit into Cross Marketing Ltd bank*

account and taking the money afterwards. The 1st accused person dealt with the cheque in a manner inconsistent with the rights of the owner thereof. The money was deposited into Cross Marketing Limited and not returned to the owner.'[Sic]

In response to the accused's argument, based on Kathumba's case that there could not have been theft because GOM acting through the Accountant General consented to the issuance and collection of the cheques the Trial Court distinguished Kathumba's case from the instant one on the facts. Therein there was a contract between the appellant and the Malawi Government. There is none here. See page 17 of the judgment[page 296 of the record].

The Appellant's

We bear in mind that he exercised his right to silence. We say so not because it matters one way or the other in relation to his guilt/innocence but just to emphasize the point that his arguments are primarily based on evidence proffered by the State.

He contends that the mere passing on of the cheque by him to the Company cannot amount to an assumption of proprietary rights in the cheque. The cheque was issued by GOM in favour of the Company. All he did was to convey, as some kind of messenger, the same to the drawee. About the K13900000.00 drawn from the Company's account and allegedly passed on to him he argued that there is no evidence that the money was for his benefit.

Secondly he contended that there is no evidence proving to the requisite standard that the Company had no claim of right to the cheque. He thought the testimony of PW2 in that regard not reliable especially in the absence of any evidence that the cheque in issue was irregularly originated, issued, collected and dealt with from those whose business it was to prepare payment vouchers and other cheque payment supporting documents, sign the cheque and to oversee the cheque collection and encashment systems i.e. MOT, The Accountant General and the Bank. In his view the only inference to be drawn from the foregoing is that the Company actually had a claim of right to the cheque.

Thirdly the appellant argued that if any money was stolen the same could not have been from GOM. The cheque was cashed from Standard Bank Ltd by its own customer Cross Marketing Ltd on the strength of another cheque issued by GOM to the Company. That money according to the case of **Chilala v R** 7 MLR 37 belonged to the bank. Not GOM. It cannot be said therefore that receipt of the money from the Company or the bank amounted to fraudulent conversion of money or a cheque belonging to GOM and therefore theft.

Lastly the appellant thinks the conviction untenable on the basis that both the cheque and its proceeds were freely given by GOM acting through the Accountant General and Standard Bank. And citing Kathumba's case the appellant is of the view that it matters not even if, which he says was not the case that the cheque could have been obtained via dubious documentation/processes. There was consent and therefore no theft.

In Kathumba's case the first appellant was contracted to build a school by GOM acting through the Ministry of Education. She subsequently presented documents to the Ministry in respect of work done as a result of which she was paid the sum of K596,802.00 via a GOM cheque. It turned out she had done no work at all. She was charged with theft. The High Court found her guilty as charged and convicted her accordingly. The Malawi Supreme Court of Appeal[MSCA] thought the cheque had been issued with consent even though based on a false representation. It overturned the theft conviction and replaced it with one of Obtaining by False Pretences contrary to section 319 of the Penal Code.

The appellant thinks the case is applicable herein. That in the absence of evidence that the cheque was originated, issued, collected or encashed without consent, the charge of theft is untenable the fact that the consent might be premised on false representations notwithstanding.

The State's

It is much of the Trial Court's mind. It argued against the appeal on three main points.

Firstly that the appellant was in relation to the K14,439,966.50 cheque guilty of theft by fraudulent conversion by giving over the cheque to the Company and allowing for it to be transacted even though he knew at all times that neither him nor the Company had any claim of right to it or its proceeds. The lack of a claim of right, according to the State, flows from the fact that neither the appellant nor the Company had any contract with GOM/MOT warranting the issuance of the cheque.

On page 14 paragraph 3.4 of its skeleton arguments the State says about fraudulent conversion and theft:

> *'it is clear that (the 1st accused) had no claim of right having not rendered any service nor entered into any contract with Ministry of Tourism. Notwithstanding how the 1st Accused came into possession of the cheque we find that he fraudulently converted the same to his and the 2nd accused person's use. This we find by virtue of the fact that the 1st accused person came into possession of the cheque and assumed the rights of the owner, Malawi Government, by giving the same to the 2nd accused person to deposit into Cross Marketing Ltd bank account and taking the money afterwards. The 1st accused person dealt with the cheque in a manner inconsistent with the rights of the owner thereof.'* [Sic]

In paragraphs 44, 46, 47 and 48 of its final written submissions the State argues:

> *'Mr Mbwana put it in evidence both as Internal Procurement[IPC] Chair and Director of Administration and Finance [DAF] that Cross Marketing had no contract with the Ministry of Tourism and that the Ministry had not authorised any payments to Cross Marketing to warrant the said payment.'*.[Sic]
>
> *'as Mr Mbwana testified, his only alternate was the Principal Secretary, and due to their respective responsibilities, he was always the one who chaired IPC meetings hence had an accurate and complete record of all contracts that the Ministry had entered into. In addition, his position as Director of Administration and Finance also made him a very strategic person to know*

which payments were indeed authorised by the Ministry of Tourism or not. And he did testify that the relevant payments were not duly authorised.

Consequently, we humbly submit that the argument that there was a possibility that there was a contract between the Ministry of Tourism and Cross Marketing or that there was a possibility Cross Marketing had a claim of right to the cheques is only an attempt to raise fanciful doubt in the mind of the Appellate Court ....'[Sic]

Secondly that the principle espoused in **Chilala v R**[supra] does not apply in this case. The Chilala case is distinguishable from the present one in its view. More than that the Chilala case has, according to the State effectively been repealed by the Public Finance Management Act[PFMA] and the Reserve Bank of Malawi Act in so far as it relates to public finances. Government money remains government money wherever it is kept. It is thus possible for one to steal government money from a bank in instances where before the conclusion would have been that the money belonged to the bank that had physical custody of it.

Thirdly and about consent and Kathumba's case the State raised four arguments. Firstly that the case is distinguishable from the instant one. It dealt with theft via fraudulent taking. This is a case of theft via fraudulent conversion. Secondly that in the Kathumba case there was a contract between the appellant and GOM. There is none here. Thirdly that the Kathumba case has been overtaken by the passing of the Public Procurement Act and lastly that the Kathumba case was wrongly decided in so far as it finds consent despite that the same was obtained by deception or false pretences.

This Court's Consideration of the Arguments

Words identical to ours above might not have been used. There is however no denying that both the State and the Trial Court concluded the appellant's guilt of theft by fraudulent conversion from, in their view, of his having dealt with the cheque in a manner that was inconsistent with the rights of the owner, namely GOM, while fully aware that neither he nor the Company had any claim to it or its proceeds. See page 12 of the State's skeleton arguments and pages 10 and 20 of the Trial Court's judgment.

Proceeding on the foregoing it is clear that the appellant would not have been found guilty of fraudulent conversion and therefore theft but for the conclusion by the Trial Court that neither the appellant nor the Company had a claim of right to the cheque or its proceeds. The reverse is equally true. Evidence of a claim of right to the cheque or a doubt whether or not there was such right means fraudulent conversion and therefore theft cannot be a justifiable/tenable conclusion.

Did the appellant or the company have a claim of right to the cheque? The State and the Trial Court answered this question in the negative. Why? Because in their view neither the appellant nor the Company had a contract with GOM/MOT pursuant to which the cheque could have been regularly issued. Meaning, as we understand the facts and law in this case that the appellant's guilt revolves around the question whether or not there was, at the material time, a contract between GOM/MOT and the company/appellant pursuant to which the cheque could have been or was issued.

A total of five witnesses testified before the Trial Court. If truth be told the relevant testimonies, now that Mr Kandoje's testimony has been discarded, were those of PW2 Kenson Mbwana, Director of Finance and Administration[DFA] and Chair of the Internal Procurement Committee[IPC] at MOT, and PW3, an employee of the Company.

The testimony of PW2 is at pages 26 and 27 of the record. We reproduce *verbatim* what was said about contracts and the cheque:

> *'in 2013 can you remember how many contract you awarded? I cannot remember it was a few contracts were awarded by the Ministry on construction. Which ones can you remember? I think I can remember one which was constructing houses in Game reserve and it was Ziuya Building Contract. There was also another one Afro Oriental which was constructing the fence at Liwonde game reserve. Today can you remember the contracts that you awarded? Yes My Lord the Ministry keeps a record of all contracts awarded. My Lady I am showing the witness the documents, what is the document you are holding in your hands? This is a photocopy of the cheque.*

What is the date? It is dated 2nd August, 2013. Who is it payable to? Crossmarketing. Does it indicate the drawer of that cheque? Yes it is Malawi Government. Does it indicate the drawer of that cheque? It is the government. What is the amount? K14439966.50. would you be able to tell the account on which that cheque was drawn? No My Lady. Would you know if that cheque was paid from your ministry? No My Lady.

Court: Marked ID1'.[Sic]

On pages 3 and 4 of its judgment the Trial Court confirmed PW2's testimony in the following terms:

'Upon being shown an image of cheque number 016134 dated 2nd August, 2013 for K14439966.50 drawn by Malawi Government and payable to Cross Marketing Ltd(ID1), Mr Mbwana told the Court that he could not tell which account the cheque was drawn from and he would not know if it was from Ministry of Tourism. He could not remember if the Ministry had dealt with Cross Marketing Ltd so as to raise the possibility of issuing that cheque'.[Sic]

Then there is the evidence of PW3. He spoke of receiving a cheque, depositing it in the Company's account at Standard Bank Lilongwe City Centre and of drawing the sum of K13900000.00 therefrom which he handed over to the appellant.

Is the State's argument and the Trial Court's conclusion that there was no contract between the appellant/the Company and MOT/GOM warranting the issuance of the cheque justified?

We have above quoted the totality of PW2's evidence. It is simple enough. About contracts he could not remember **how many construction** contracts MOT awarded in 2013. Out of whatever number was awarded he could only remember two contracts. One to 'Ziuya Building Contract' and another to 'Afro Oriental'. He never said, as the State claims in paragraphs 44, 46, 47 and 48 of its final arguments and the Trial Court in paragraphs 3 and 2 of pages 18 and 20 of its judgment that the Company had no construction or any other contract with GOM/MOT. More importantly, and despite saying that MOT kept a record of all

awarded contracts, the witness did not produce such record in court. He never even said, from recollection that the Company's name was not on such record. Surprising for that would have put this point to rest.

About the cheque all he could do was identify it as a GOM cheque issued to the Company. He never said, again as claimed by the State that MOT did not authorize any payment via cheque number 016134 to the Company. Or that the documents on the basis of which the said cheque was issued did not originate from or were not authorised by MOT. PW2 did not even tell from which account it was drawn. Not even whether it was drawn from an MOT account which is inexplicable seeing as he was after all Director of Finance and Administration and Chair of the Internal Procurement Committee in MOT and a witness the State variously described in its final written submissions as *'most crucial,* one who had *'an accurate and complete record of all contracts that the Ministry had entered into'* and *'a very strategic person to know which payments were indeed authorised by the Ministry of Tourism or not.'*[Sic].

Clearly PW2 was neither any nor all of the above. Not when he could not identify his own Ministry's cheque; say nothing regarding the origin of the cheque payment; not recall, notwithstanding the existence of records, either how many contracts MOT awarded in 2013 or whether the Company had any contract with MOT in 2013. Records he could not even produce for the Trial Court's perusal or whose absence in court he could not explain important though they clearly were leaving some wondering whether he could have been masking evidence adverse to the State's case. See **NBS Bank Ltd v BP Malawi Ltd** Commercial Cause Number 12 of 2007[unreported], **Maonga & Others v Blantyre Print and Publishing Co. Ltd** (1991) 14 MLR 240.

If we may therefore recapitulate the question whether or not the appellant is guilty of theft depended on proof beyond reasonable doubt that he fraudulently converted the cheque by dealing with it in a manner inconsistent with the rights of the owner i.e. GOM. Whether or not he fraudulently converted the cheque depended on proof beyond reasonable doubt that the Company, indeed himself, had to his actual or presumptive knowledge, no claim of right to the cheque and its proceeds. And that whether or not he had a claim of right to the cheque and its

proceeds depended on proof beyond reasonable doubt that there was no contract between the Company/appellant and MOT/GOM necessitating the cheque's issuance. Or that the cheque was irregularly issued for not having been duly authorised.

Any which way we look at the testimony of PW2 as quoted and discussed above there is no proof beyond reasonable doubt that the Company did not in 2013 have a contract with MOT/GOM warranting the issuance of the cheque number 016134. Or that it[the cheque] was, as somehow thought by the State, issued without the authority of MOT. It is clear that the conclusion that the Company had no claim of right to the cheque and therefore its proceeds is, on the evidence, unjustifiable. Whereas therefore there is evidence that the appellant had possession of and passed on the cheque to the Company via PW3 the same could not have amounted to fraudulent conversion. The charge and conviction for theft, in so far as it is based on the evidence of PW2 is untenable/unjustifiable.

Then there are the cheque's attributes. Like any other cheque's they tell a story. A known regularly originated, issued, collected and encashed cheque presupposes the existence of a claim of right *vis a vis* the cheque and its proceeds. It is also indicative of an absence of illegality about it. The reverse should also be true. In the instant case there is no suggestion that cheque number 016134 was irregularly originated, issued, collected or dealt with. PW3 and the bank never said that there was anything untoward or illegal about the withdrawal of the K13900000.00 and its handing over to the appellant. The conclusion should be obvious. There is no basis for suspicioning, much less concluding, that the cheque was unauthorised indeed that the appellant stole it and/or its proceeds.

There are three other issues, one raised by ourselves the others raised and argued by the parties that we feel obliged to comment on. Even only as a matter of courtesy and/or *obiter*.

The first is about the burden of proof. As we have said above it was for the State to prove beyond doubt that there was no contract between the appellant/the Company and MOT/GOM. Not for the appellant to show that there was a contract.

On page 17 last paragraph of its judgment the Trial Court said '*on the available evidence before us, we cannot conclude that there was a contract between the 1st accused person and the Malawi Government*'. With respect the Trial Court proceeded wrongly. That approach entailed someone, naturally the appellant, having to prove the existence of a contract. That is not how it should be. The correct approach should have been for the Trial Court to ask itself whether, on the available evidence, there was proof beyond doubt that there was **no contract** between the appellant/Company and MOT/GOM. That would have obliged the State to, as it should, prove the absence of the contract. In proceeding like it did the Trial Court more than suggested a reversal of the burden of proof.

For the record we should hasten to say that a misapprehension/misapplication of the burden of proof is, of itself, not always fatal to a conviction. An appellate/review court does not set aside a conviction on the basis of a mere misapprehension/misapplication of the burden of proof. It instead takes another look at the evidence, does that which the Trial Court should have done, i.e. correctly state and apply the burden of proof, and asks itself the question whether the conviction is on the evidence merited the misapprehension/misapplication notwithstanding. If the answer is in the negative the misapprehension/misapplication will be fatal to the conviction. If the answer be in the positive the appellate/review court will ask itself another question namely whether or not the appellant will suffer injustice if the conviction is maintained the misapprehension/misapplication notwithstanding. If he will, the conviction will be set aside still. If not the conviction will be maintained.

In the instant case we will not go through the above exercise in view of our ultimate decision[s]. It is enough that the point has been made and hopefully noted.

The second issue is whether GOM or the bank parted with the cheque/cash allegedly stolen consensually. The thinking is simple. The presence of consent excludes theft. So that if the Bank or GOM parted with the money/cheque by consent any suggestions of theft will have no basis.

The appellant argues that he cannot in the circumstances of this case be guilty of theft. The evidence, in his view, does not show a lack of consent regarding his possession of the cheque and/or the money. Proceeding on Kathumba's case he posits that he would not be guilty of theft even if it were the case, which it is not, that he acquired the cheque and/or the money on the basis of false representations or documentation.

In Kathumba's case there was a representation that the work contracted for had been carried out. Believing that to be a fact GOM issued a cheque for work done. In the view of the MSCA there was consent even though premised on a false representation. It, because of the consent, thought a conviction of theft untenable. It set it aside and substituted therefor one of Obtaining Money by False Pretences contrary to section 319 of the Penal Code.

The State argues that Kathumba's case was decided in error[*per incuriam*] and is distinguishable from the instant case. There was a contract between the appellant and GOM in that case. There is none herein. More importantly in its view, consent cannot be concluded where it was obtained by deception or false pretences.

There are two sides to this issue. One about the cheque and another about the actual cash. About the cheque there are two questions: Is there any evidence that the appellant acquired the cheque without the consent of GOM or any of its duly authorised agencies? That he was in possession thereof without the consent of GOM? The answers can only be in the negative.

The other side is that of the actual cash. According to PW3 he withdrew the sum of K13900000.00 from Standard Bank and gave it to the appellant. Again two questions arise. Is there evidence that the Bank gave out the money without its consent? Or that PW3 handed over the money minus his or the Company's consent? The answers can also only be in the negative. Ultimately can it be said that there is in the circumstances evidence of the appellant having stolen the cheque or its proceeds? The answer is yet another no.

The State of course contends that Kathumba's case is distinguishable in the alternative that it was wrongly decided. With respect it is probably much ado about nothing. The fact of the matter is that there is neither proof of a lack of

consent nor of a deception or misrepresentation. We cannot, as we see it, therefore be talking of theft of the cheque/cash. Neither should we be talking of contaminated consents and *per incuriam*[i.e. wrong] decisions. It would be an exercise in futility.

The third is the matter of who, as between GOM and the bank, owned the money allegedly stolen. It is an important issue. It goes to the propriety of the theft charge. The allegation against the appellant is that he stole money belonging to GOM. If, as the appellant contends, the money did not belong to GOM the charge would be defective for want of the correct particulars. The State would be guilty of not proving what it alleged namely that the money belonged to GOM while at the same time running the real risk of trying to prove that which it did not allege namely that the money belonged to the bank or the Company.

The appellant's argument is that the money could not have been that of GOM. What he got belonged to the Company. What the Company gave him belonged to Standard Bank. If there was any theft, which is denied, the same could only have been of Standard Bank's or the Company's money. To the extent therefore that the charge misapprehended the money's ownership i.e. wrongly attributed ownership to GOM, the conviction is fatally flawed for effectively disclosing no offence. He cited Chilala's case which endorsed the views of two English cases of some antiquity. The first is the case of **Foley v Hill** (1848) 2 HLC 28 where the House of Lords said at 36 - 37:

> *'money, when paid into a bank, ceases altogether to be the money of the principal; it is then the money of the banker, who is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it. The money paid into the banker's, is known by the principal to be placed there for the purpose of being under the control of the banker; it is then the banker's money; he is known to deal with it as his own; he makes what profit of it he can, which profit he retains to himself, paying back only the principal, according to the custom of bankers in some places, or the principal and a small rate of interest, according to the custom of bankers in other places. The money placed in the custody of a banker is, to all intents and purposes, the money of the banker, to do with it as he*

pleases; he is guilty of no breach of trust in employing it; he is not answerable to the principal if he puts it into jeopardy, if he engages in hazardous speculation; he is not bound to keep it or deal with it as the property of his principal, but he is of course answerable for the amount, because he has contracted, having received that money, to repay to the principal, when demanded a sum equivalent to that paid into his hands.

That has been the subject of discussions in various cases, and that has been established to be the relative situation of banker and customer. That being established to be the relative situation between banker and customer, the banker is not an agent or factor, but he is a debtor'.

The second is **R v Davenport** [1954] 1WLR 569 at 571 where Goddard CJ said:

'the fallacy that led to the charges of stealing money was this: it was thought that because the master's account got debited that was enough to constitute a theft. But, although, one talks about a person having money in the bank, it is just as well that it should be understood that the only person who has money in a bank is a banker. If I pay money into my bank either by paying cash or a cheque, that money at once becomes the money of the banker. The relationship between banker and customer is that of debtor and creditor. He does not hold any money as an agent or trustee; the leading case of Hill v Foley (1848) 2 HLC 28, exploded that idea. Directly the money is paid into the bank it becomes the banker's money, and the contract between the banker and the customer is that the banker receives a loan of money from the customer as against his promise to honour the customer's cheques on demand. When the banker is paying out, whether in cash over the counter or by crediting the bank account of somebody else, he is paying out his own money, not the customer's money, but he is debiting the customer's account. The customer has a chose in action, that is to say, a right to expect that the banker will honour his cheque, but the banker does it out of his own money'.

The State disagrees. It sought to distinguish Chilala's case and thinks it inapplicable anyway seeing as it was repealed by the combined effect of the PFMA

and PPA. Specifically the State argues that Chilala's case involved private money while the instant case is about public money. The banking dynamics are different. The former is banked with commercial banks while the latter is banked with the Reserve Bank of Malawi. But that even in those instances where public money is banked with commercial banks it still remains public property by virtue of section 31 of the PFMA which stipulates:

> *(1) 'Public money is the property of the State;*
>
> *(2) Public money shall, except as otherwise provided in this Act, be paid into accounts designated by the Secretary to the Treasury for that purpose and such accounts shall form part of the Consolidated Fund;*
>
> *(3) Money paid into any designated account is public money, and shall not be removed except as provided by the Constitution or this Act'.*

Secondly, the State argues that there was, in the instant case no contract between the appellant and GOM. The cheque and therefore the money the proceeds thereof still remained GOM's money by virtue of them being stolen property. Stolen property remains that of the person from whom it was stolen in this case GOM. So that when the same was withdrawn from the Bank and passed on to the appellant it remained GOM's money.

We were referred to the cases of **R v Forsyth** [1997] 2 Cr App. 299 and the Tanzanian case **Tilwilizayo v R** [1983] TLR 403 where the Court allegedly said:

> *'The cheques were forgeries and the appellant had no claim of right to any of them. On the analogy that a cheque can be imported into a charge by virtue of its being money within the meaning of that term under the Penal Code, I am of the view that the appellant was properly convicted as charged on the counts of theft, ...'* **[Sic]**

Thirdly the State thinks Chilala's case applies only to thefts by fraudulent taking and not, as is the case in the instant matter, of theft by fraudulent conversion.

We were also referred to **R v Caroline Savala** Criminal Case Number 28 of 2013 High Court of Malawi Lilongwe Registry[unreported] which according to the State

emphasises the points that public money does not cease to be such merely because it has been deposited into some person's account.

It is important in our view that one understands not just the principle enunciated in Chilala's case but precedent generally, our legislation dealing with theft and ultimately the purport of the PFMA and the PPA. About precedent we notice that the State sought to distinguish Chilala's case on the basis of the facts that herein the money/cheques were stolen, that there was no contract between the appellant/the Company and GOM/MOT and that the cheque was irregularly originated, issued, collected and transacted. There is no evidence of such facts in the instant case. Respectfully the State's attempt to distinguish Chilala's case on the basis of these facts cannot be successful.

About legislation relating to theft the State is correct when it argues that section 271 of the Penal Code provides for more than one species of theft. In this case we have been told of theft by fraudulent taking and theft by fraudulent conversion. The former is all about '*taking and carrying away anything capable of being stolen without the owner's consent*' while the latter is about '*dealing with another's property in a manner that is inconsistent with the owner's continued ownership of their property*'. We agree that Chilala's case and therefore **Foley** v **Hill** and **R** v **Davenport** are very much about theft by 'taking and carrying away' as opposed to theft by 'fraudulent conversion'. And also that the State's case against the appellant is of the 'theft by fraudulent conversion' genre. We however are unable to grant the State's argument that they have proved a case of 'theft by fraudulent conversion' against the appellant and it should therefore be distinguished from Chilala's case. The facts do not bear that out. They point to a regularly issued and transacted cheque. A cheque and therefore money that was free of theft. There was thus nothing to prevent title to the cheque's proceeds moving, in accordance with the principle in Chilala's case, to the Bank upon the cheque being deposited/cleared. At the time of withdrawal the money had ceased to belong to GOM. It was now that of the Bank. By the time it was handed over to the appellant it was the Company's money. For purposes of theft the money was not GOM's. Maybe in accounting terms seeing as a credit balance is treated as an asset.

Regarding the DPP's concerns about the above exposition of the law not taking into account section 31 of the PFMA, unduly exposing GOM financial resources to abuse with no possibility of GOM getting back its own and ultimately not recognising the fact that the PFMA, the PPA and the Reserve Bank Act have repealed the principle in Chilala's case the way forward is to first establish what Chilala's case is all about. In our view it is generally about the relationship between a banker and its customer. Specifically it lays down the principles *inter alia* firstly that the relationship between a banker and their customer is that of a creditor and debtor. Secondly that title to deposited cash passes to the banker on receipt of the deposits and thirdly therefore that it is impossible for anyone to 'take and carry away' a customer's deposit once receipted.

The questions, in view of the DPP's concerns, are 'has the advent of the PPA, the RBM Act and PFMA changed the relationship between banker and customer? Has it stopped being that of creditor and debtor? Is it now possible for someone to 'take and carry away' a customer's deposit post receipt? Ultimately has the PFMA, the RBMA and PPA indeed effectively repealed Chilala's case?

We agree that normally legislation trumps precedent. We have looked at the PPA and the PFMA. The former's objective[s] and substance has very little, to put it mildly, to do with the banker/customer relationship. The former's business is to regulate the procurement of goods and services in the public sector. The latter provides for a lot of things specifically in relation to the management of public finances. It would however be stretching things a tad too far to suggest that these Acts allow one to 'take and carry away' a customer's money in the custody of his banker. If, as the State suggests, the immediately foregoing were possible it would raise the obviously absurd spectre whereby in all banks having a positive GOM balance would be a mound of cash specifically designated as GOM's so that any theft thereof would be a theft of GOM's and never the Bank's money. That cannot be. The truth is that the relationship between a customer, including GOM, and its banker, be it with the RBM or any commercial bank, in relation to receipted deposits remains that of creditor and debtor the presence and advent of the RBMA and the PFMA and the PPA respectively notwithstanding. The deposits that GOM pays into its accounts cease to be its money on being received by the bank. When

the bank pays out in honour of a GOM cheque it pays its own money. Not GOM's. When someone 'takes and carries away' cash from a bank they take and carry away the bank's money. Not GOM's. This despite the fact that the sum may, at the end of it all be deducted from a GOM account.

About section 31 it is important that one understands its purport and does not attribute to it what it clearly does not say and is not. The simple truth is that public money is paid into designated accounts. These accounts, with the greatest respect, are not some giant receptacles into which is stashed public money. They are ledgers in which GOM's financial dealings in a particular bank/bank account are recorded. When section 31 talks of accounts being part of the Consolidated Fund it is really talking about proceeds of such accounts. When it talks of public money not being removed except as by law provided it is not talking of bank notes being taken out of these receptacles in some special fashion. It is talking of sums of money being withdrawn from GOM's accounts much like all bank account holders do in strict accordance with mandates decreed by law[most likely the PFMA] and agreed to between the bank[s] and GOM. It is, in our opinion, therefore rather simplistic, if not actually erroneous to think that public money will be unduly exposed to pilferage merely because deposits are construed as the receiving bank's money post receipt. The opposite is most likely the case. Because money is, post deposit, the Bank's it cannot be 'taken and carried away' i.e. stolen from GOM. That is the risk of pilferage reduced. More than that the money, while with the bank, is payable only on demand in accordance with pre-agreed protocols/mandates. The bank will recompense GOM if it paid out otherwise than in accordance with those protocols/mandates. Yet more reduced risk and assurance, if any were needed, of the fact that the principle in **Chilala v R**, **R v Davenport** and **Foley v Hill** does not expose public money to undue risk.

If we may therefore recap it seems that the theft conviction was not only untenable it was, in the circumstances, most likely misconceived. There are more than strong suggestions that the cheque and therefore the money were willingly given. And that the money allegedly stolen did not actually belong to GOM.

Relief

The powers of this Court on appeal are set out in section 12 of the Supreme Court of Appeal Act Cap 3:01 of the Laws of Malawi as follows:

> *'(1) the Court shall allow an appeal under section 11 if it thinks that the judgment appealed against should be set aside -*
>
> *(a) On the ground that it cannot be supported having regard to the evidence;*
>
> *(b) On the evidence of a wrong decision of any question of law; or*
>
> *(c) On any ground that there was a miscarriage of justice,*
>
> *Provided that the Court may, notwithstanding the fact that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.*
>
> *(2) subject to section 13 the Court shall, if it allows an appeal against conviction quash the conviction and direct a judgment and verdict of acquittal to be entered or order the appellant to be retried by a court of competent jurisdiction.'* **[Sic]**

The appellant *inter alia* prayed that the conviction and sentence entered against him for theft be quashed. We have above concluded that the conviction of theft is untenable regard being had to the evidence and law. The said conviction and the sentence imposed in respect thereof are hereby quashed.

We thought about the possibility of an alternative conviction. Much like was done in Kathumba's case. We will not enter one. We have doubts, serious doubts, whether a verdict of Obtaining by False Pretences would be justified in this case. In Kathumba's case there was evidence beyond doubt of a falsity, namely the claim that work had been done. Can we, in the instant case point to a false pretence in relation to either the issuance, collection or encashment of the cheque? Or the cash obtained from Standard Bank and handed over to the appellant? The answer is in the negative. The question of an alternative verdict simply does not arise.

The above notwithstanding we do not think that courts should be entering alternative verdicts of the kind envisaged herein. We are convinced they are not the way to go in the current constitutional dispensation. There are issues, of a constitutional nature, which were clearly not considered/addressed in Kathumba's case but which if they had would have led to an agreement with our sentiments above.

Firstly in these days of constitutional supremacy and separation of powers, it is, constitutionally, for the State in the person of the Director of Public Prosecutions to decide who to prosecute, for what offence and before which court. A Trial Court's role is only to decide, on the basis of the charge[s] and evidence before it, on the guilt or otherwise of the accused. If the accused is guilty it shall say so. If not it will also say so. But it is not, in our judgment, for courts to convict accused persons for offences not brought to it by the State. Thought fit by themselves. The courts would, in so proceeding, i.e. in entering alternative verdicts in those circumstances, be exercising powers they do not have and arrogating to themselves powers constitutionally granted to the DPP. They should do neither.

We are aware that over the years courts have entered alternative verdicts. That there has even developed a jurisprudence and law on how and when this should be done namely when a court is convinced that it will occasion no injustice to the accused. See sections 153 - 157 of the CP&EC inclusive. We will respond by pointing out that most of this jurisprudence and law is pre-1994. Before the current constitutional dispensation. And further that we do not think that the CP&EC can, in view of section 5 of the Constitution, take away powers or give powers which the Constitution has given or not given.

Secondly we are convinced that we would, if we entered an alternative verdict, be flouting the appellant's fair trial rights. Above we have spoken of how an accused should *inter alia* be presumed innocent; how he should be allowed an adequate opportunity to defend himself; of how he should be informed with sufficient particularity of the allegations against him; of how he should be allowed to lead evidence and question witnesses; and of how he should be tried before, at the very least, an impartial court. Are alternative verdicts, made as they are in the comfort of the court's chambers in the absence of the parties, after the close of the

parties' cases the products of a fair trial? We think not. A Court cannot claim impartiality or to have abided by the tenets of fair trials if it, of its own volition and without hearing the accused finds him guilty of an offence other than the one he was charged with. An offence in respect of which he *inter alia* entered no defence, called no witnesses in his defence and was not informed of at all.

Thirdly, and considering that an alternative verdict should only be entered where the same occasions no injustice to the accused, it appears to us surreal that an accused can be convicted of an offence not charged, not informed about and in respect of which he entered no defence without at the same time occasioning him an injustice.

In our most considered opinion criminal courts must keep away from alternative verdicts. Unless they are for offences charged in the alternative. Let it be for the State to, as they prosecute, follow the proceedings well enough to know when an amendment is needed in view of a new turn of events. If they cannot they should, like everybody else, face the consequences of their shortcomings. The High Court in **Agripa Soko v R** Criminal Appeal Case Number 119 of 2007, Mzuzu Registry[unreported] expressed similar sentiments. We agree with them.

Then we thought about a retrial. We will also not order one. The High Court in **Banda v R** Criminal Appeal Number 11 of 1980[unrep] set out the principles which must govern retrials. It said apart from all else the ordering court should be convinced that there is evidence disclosing a case against the appellant in respect of the offence charged or some other offence. We will repeat ourselves a little. It should not be for the Court, having acquitted an appellant, to then decide that there is sufficient evidence on the basis of which he/she should be re-prosecuted. The State, acting via the DPP, should make that decision.

From a different perspective we think that retrials must actually never be resorted to. They interfere with the independence/impartiality of trial courts, afford the State a needless second bite of the cherry and effectively allows it[the State] to benefit from its own error[s]. Because a retrial is only ordered where a superior court is convinced there is sufficient evidence to secure a conviction against the appellant the superior court is, at the time of remitting the case for retrial

effectively telling the retrial court, placed down on the hierarchy, which way to go in so far as the accused's guilt is concerned. That does not offer the trial court much room within which to exercise its independence/impartiality.

A retrial will not therefore be ordered. If the State thinks this a proper case for one they will approach an appropriate court and convince it of the propriety of such course of action taking into account the issues raised above including the possibility of double jeopardy.

The Money Laundering Conviction

The Trial Court found the appellant guilty of laundering the sum of K14,439,966.50. The reasoning was simple enough.

On pages 21-22 of its judgment the Trial Court variously said:

> *'the 1st accused person stole the K14,439,966.50 by fraudulent conversion. Having stolen the money himself, he knew that this money was proceeds of crime. Section 2 of the Money Laundering Act defines proceeds of crime as any property derived or realised directly or indirectly from a serious crime. The K14,439,966.50 was derived directly from the Theft, which is classified as a felony, a serious offence, in our penal law.*
>
> *The essence of the offence created in section 35(1)(c) of the Money Laundering Act is acquiring possessing or using property knowing or believing the same to have been derived directly or indirectly from proceeds of crime. The 1st accused was given K13.9 million of the funds derived from the theft. He acquired and possessed this money knowing it was derived directly from crime. ..... We therefore find that the elements in section 35(1)(c) of the Money Laundering Act have been satisfied, beyond reasonable doubt against the 1st accused person'*.[Sic]

In the Trial and this Court the State's money laundering case is premised on their belief that the money was the proceeds of theft. Specifically on the fact that the appellant stole the money in issue. We think it obvious that the Trial Court's conclusion and the State's argument would be on loose ground but for the theft conviction.

Now that this Court has found the theft conviction untenable should the money laundering conviction still stand?

The charging section i.e. section 35, provides:

> *'(1) A person commits the offence of money laundering if the person knowingly or having reasonable grounds to believe that any property in whole or in part directly or indirectly represents any person's proceeds of crime_*
>
> > *(c) acquires, possesses or uses that property, knowing or having reason to believe that that it is derived, directly or indirectly, from proceeds of crime'.*
>
> *(2) For purposes of proving of the money laundering offence under subsection (1), it is not necessary that the serious crime be committed.*

Looked at in the context of *actus reus* and *mens rea* the appellant can only be guilty of money laundering if firstly the money i.e. K14439966.50 is *proceeds of crime* and secondly if he knew or had reasonable cause to believe, at the material time, that the said sum was proceeds of crime. In our judgment the primary question is therefore whether the sum of K14439966.50 is the proceeds of crime. If the answer is beyond doubt in the positive the appeal will fail. On the other hand the appeal will succeed if the answer is in the negative or there is doubt as to whether the money is the proceeds of crime or not.

In section 2 of the Act 'proceeds of crime' is defined as '*property derived or realised directly or indirectly from a serious crime ...*'.

Serious crime is defined in the same section 2 as:

> *'an offence against the provision of-*
>
> > *(a) any written law in Malawi, for which the maximum penalty is death or imprisonment for life or other deprivation of liberty for a period of not less than twelve months, and includes money laundering and terrorist financing*

(b) *A law of a foreign State in relation to acts or omissions which had they occurred in Malawi, would have constituted an offence for which the maximum penalty is death, or imprisonment for life or other deprivation of liberty for a period of not less than twelve months and includes money laundering and terrorist financing'.*

Meaning therefore that property is not *'proceeds of crime'* merely because it derives or was realised from crime. It is only *'proceeds of crime'* if it is derived or realised from a *serious crime*. And a crime is a serious crime only if it is *an 'offence against any written law in Malawi whose maximum penalty is death, life imprisonment or deprivation of liberty for not less than twelve months'.*

For purposes of money laundering one can therefore only be guilty if they are, to their actual or presumptive knowledge, in possession of property directly or indirectly derived or realised from a serious crime as defined above. Meaning as well that proceeds from any other offence cannot, obviously be proceeds of crime. Neither can they be the subject of a money laundering charge much less conviction.

Coming back to the instant case and proceeding on the above analysis of sections 2 and 35(1) of the Act the question whether the sum of K14439966.50 is proceeds of crime must change a little. It is now whether the said sum is *'derived or realised directly or indirectly from an offence against any written law of Malawi whose maximum penalty is death or life imprisonment or other deprivation of liberty for a period of not less than twelve months'*. If the answer is in the positive we will answer the second question which is whether the appellant/accused knew or had reasonable grounds for believing, at the material time, that the property was such. The guilty verdict will only be maintained if the answer to both questions is beyond doubt in the positive. If the answer to both questions or any one of them is in the negative or there is doubt in respect of the answers the conviction will be overturned.

The answer to the first question is obvious enough in our opinion. It is in the negative. There is no evidence that the sum of K14439966.50 derived or was realised directly or indirectly from an offence against any written law of

Malawi punishable as above stated. The money laundering conviction cannot stand in the absence of not just the theft conviction but any serious crime.

Just a word about section 35(2). It most likely is a misnomer. From our debate above it should be obvious that a money laundering charge cannot stand in the absence of proof of the commission of the serious crime from which the property the subject of the money laundering charge derived. One just cannot talk of money/property having derived from a serious crime, of proceeds of crime and of money laundering if the serious crime itself was not committed.

The above notwithstanding we realise we are not reinventing the wheel in so far as money laundering is concerned. We therefore decided to take a look at how the English jurisdiction has dealt with money laundering with special emphasis on criminal property. Particularly engaged are sections 329 and 340 of the Proceeds of Crime Act 2002[POCA] of England and sections 51 and 93C(2) of the Drug Trafficking Act 1994[DTA] and Criminal Justice Act[CJA] 1988 of England respectively which are not too distantly related to our own sections 2 and 35 of the Act.

Section 51(1) of DTA provides:

'Part III

OFFENCES IN CONNECTION WITH PROCEEDS OF DRUG TRAFFICKING

51. Acquisition, Possession or Use of Proceeds of Drug Trafficking

(1) A person is guilty of an offence if, knowing that any property is, or in whole or in part directly or indirectly represents, another person's proceeds of drug trafficking, he acquires or uses that property or has possession of it.'

Section 93C of CJA reads:

(1) 'A person is guilty of an offence if he-

(a) Conceals or disguises any property which is, or in whole or in part directly or indirectly represents, his proceeds of criminal conduct; or

(b) Converts or transfers that property or removes it from the jurisdiction,

For the purpose of avoiding prosecution for an offence to which this Part of this Act applies or the making or enforcement in his case of a confiscation order.

(2) A person is guilty of an offence if, knowing or having reasonable grounds to suspect that any property is, or in whole or in part directly or indirectly represents, another person's proceeds of criminal conduct, he-

(a) Conceals or disguises that property; or

(b) Converts or transfers that property or removes it from the jurisdiction, for the purpose of assisting any person to avoid prosecution for an offence to which this Part of the Act applies or the making or enforcement in his case of a confiscation order'.

Section 329 of POCA:

(1) A person commits an offence if he-

(a) Acquires criminal property;

(b) Uses criminal property;

(c) Has possession of criminal property.

In section 340(2) of POCA criminal conduct is defined as:

'conduct which-

(a) Constitutes an offence in any part of the United Kingdom, or

(b) Would constitute an offence in any part of the United Kingdom if it occurred there.'

In section 340(3) of POCA property is criminal property if-

(a) 'It constitutes a person's benefit from criminal conduct or it represents such a benefit (in whole or part and whether directly or indirectly), and the alleged offender knows or suspects that it constitutes or represents such a benefit.'

The Supreme Court in England held, subject to what it called immaterial exceptions, in **R v GH** [2015] UKSC 24 that the *actus reus* for a section 329 offence was acquisition, use and possession of criminal property while the *mens rea* is knowledge or suspicion that the property was criminal property.

In paragraph 20 the Court said:

'there is an unbroken line of authority that it is a prerequisite of the offences created by sections 327, 328 and 329 that the property alleged to be criminal property should have that quality or status at the time of the alleged offence. It is that pre-existing quality which makes it an offence for a person to deal with the property, or to arrange for it to be dealt with, in any of the prohibited ways. To put it in other words, criminal property for the purposes sections 327, 328 and 329 means property obtained as a result of or in connection with criminal activity separate from that which is the subject of the charge itself'.

In **R v Loizou** [2005] 2 Cr App R 618 the Court said:

'criminal property within section 327 meant property which was already criminal at the time of the transfer, by reason of constituting or representing a benefit from earlier criminal conduct and not the conduct which was the subject of the indictment'.

In **Kensington International Ltd v Republic of Congo(formerly People's Republic of Congo) (Vitol Services Ltd, Third Party)** [2007] EWCA Civ 1128 [2008] 1 WLR 1144 it was said:

'the mental element of the offence includes knowledge or suspicion on the part of the defendant that the property in question is criminal property, but that cannot be the case until it has been acquired by means of criminal conduct. In order for an offence under section 328 to be committed, therefore, the arrangement into which the defendant enters, or in which he becomes involved, must be one which facilitates the acquisition, retention, use or control by another of property which has already become criminal property at the time when it becomes operative. That requirement is not satisfied if the only arrangement into which he enters is one by which the property first acquires its criminal character'.

See also **R v Geary** [2010] EWCA Crim 1925, [2011 1 WLR 1634, **R v Amir and Akhtar** [2011] EWCA Crim 146, [2011] 1 Cr App R 464 and **JSC BTA Bank v Ablzazov** [2009] EWCA Civ 1124, 1 WLR 976 where sections 327, 328 and 329 were described by Moses LJ as 'parasitic' offences, because they are predicated on the commission of another offence which has yielded proceeds which then become the subject of a money laundering offence.

About proving that a particular property is criminal property a recourse into the history books is necessary. In the days of the Drug Trafficking Act 1994 and Criminal Justice Act 1993 the indictment needed to allege and prove the drug trafficking or criminal activity out of which the property arose. The drug trafficking or criminal conduct was in other words an essential part of the *actus reus*. See **R v Montila** [2004]UKHL 50 and also **R v Ussama Sammy el-Kurd**.

Things have changed a bit since POCA. There is now no dichotomy between criminal property arising out of drug trafficking and that arising from any other criminal conduct. Criminal property is simply property derived from criminal conduct. See sections 329 and 340 of POCA. Consequently the Crown does not now have to allege and prove a specific offence or specific class of offence in order to show that a certain property is criminal property. In **R v Anwoir & Others** [2008] EWCA Crim 1354 Latham LJ said there are two ways in which the Crown can prove property is criminal property. Either by showing that it derived from conduct of a specific kind or kinds and that conduct of that kind or those kinds was unlawful or by evidence of the circumstances in which the property was handled, which were

such as to give rise to the irresistible inference that it could only be derived from crime. See also **R v F & B** [2008] EWCA Crim. 1868.

Much the same was said in **Ahmed v Her Majesty's Advocate** [2009] ScottHC HCJAC 60. Before both the High Court and the Court of Appeal the Crown sought to draw an inference from the totality of the circumstances, and in particular from the way it was handled that the cash in issue was criminal property. The Crown argued that:

> *'what the Crown has to prove is that the property is or represents, in whole or in part, directly or indirectly, benefit from crime, without specifying the nature of that crime'.*

The Trial Judge was of the Crown's mind. In his charge to the jury he, *inter alia*, said:

> *'For the purposes of the Act, however, it does not matter what sort of crime the profit has come from. It is not necessary in relation to the offences created by this part of the Act for the Crown to prove the source of such proceeds provided, of course, that the source was criminal'.*

On appeal the appellants contended that on a proper construction of POCA and in particular having regard to section 340(2) and (3) it was necessary for the Crown;

> *'in every case where a charge of money laundering was brought, to prove that the property which an accused was said to have, ... was property which formed a person's benefit from a specific criminal offence or, at least his benefit from a specific class or type of criminal offence'.*

The Scottish Court of Appeal agreed with the Crown. In paragraph 12 of its judgment it said:

> *'part 7 of the Act is plainly designed to prevent the laundering of 'dirty' money or other property constituted by any person's benefit from criminal conduct. It requires no special knowledge to appreciate that criminal conduct may be of many different kinds, and that cash or other property*

can be accumulated by the same person or persons as a result of many different forms of criminal behaviour, whether drug dealing or racketeering or theft etc. Against that background the question to which the language of section 340(2)(a) gives rise, is whether it is enough in any case to prove that the property must have derived from some offence, or offences, or whether it is necessary to prove that it derived from a specific offence, or offences. There is nothing, it appears to us, in the language of section 340(2)(a) which suggests the latter. Indeed in ***R v NW and Others*** *[2008] EWCA Crim 2, ... it was acknowledged by Laws LJ, delivering the opinion of the court, that the force of the Crown's position in that case rested 'in the fact that the statutory words appear to contain no reference, certainly no express reference, to any need to particularise the crime or class of crime in question'. ..... it is one thing for Parliament to have provided that the Crown must shoulder the burden of proving beyond reasonable doubt that any property is the product of some criminal offence or offences. It would be quite another to suppose that Parliament intended the Crown to undertake in every case the heavy additional burden of proving the specific offence or offences from which any particular property derived. Of course proof of the particular provenance of criminal property may, in certain cases be entirely possible, but to senior counsel's question 'how can one know the property is derived from criminal conduct unless one is able to prove a particular offence or at least class of offence?' there is, we think, a ready answer. It is not difficult to conceive of circumstances, particularly perhaps relating to the handling or movement of large sums of cash, which could readily be said to yield an inference, in particular absent any innocent explanation, that the cash was acquired as a result of criminal conduct, even if the particular offence, or offences, was, or were, unknown.*

This too was accepted in **R v NW and Others**, in particular paragraph 16 where it was said:

'we did not understand the respondents to submit that there could never be a case in which the Crown might properly invite the jury to infer from

the available facts that criminal activity was the only reasonable and non-fanciful explanation for the presence of the relevant property in the hands of the defendants, even though there was nothing to show what class of crime was involved. We would in any event reject so general and unqualified a proposition. Everything, of course depends on the particular facts. The protection of the defendants is such that an inference can only properly be drawn if it meets the criminal standard of proof, and the jury must of course be so directed'.

Is our approach to money laundering especially criminal property any different from that of the English courts? It is obvious we are singing from the same hymn book. Maybe not the same song. It therefore is for the Crown or, in our case, the State to prove a case beyond reasonable doubt. It is, in our understanding, of what that case is and the manner of dealing with criminal property that we have drifted apart. For us the State must prove that the accused had *inter alia* possession of property which he knew or had reasonable cause to believe was the **proceeds of crime**. For the English they must prove that the accused had *inter alia* possession of property which he knew or **suspected was criminal property**[our emphasis]. the English prosecutors now[i.e. since POCA] no longer have to allege and prove a specific or a specific class of crime as the origin of the criminal property. They allege criminal conduct generally and lay before the Court evidence of the circumstances in which the property was handled/obtained which are such as to give rise to the irresistible inference that the property could only have derived from conduct constituting an offence i.e. criminal conduct.

Contrast the above with our situation. Section 35(1) provides for more than criminal conduct or offences generally. It specifies the class of offence from which the proceeds of crime can derive namely a serious offence which is defined as an offence *against the written law of Malawi which is punishable by a maximum penalty of death or life imprisonment or other deprivation of liberty for a period of not less than twelve months*. When the State therefore alleges that an accused knowingly possessed *proceeds of crime* it is alleging and undertaking to prove knowing possession of property deriving out of an offence against the written law of Malawi punishable by a maximum of death penalty or life imprisonment or other

deprivation of liberty for a period of not less than twelve months. It is imperative that such offence or class of offence is specified if not in the indictment then most certainly in disclosures or addresses to the court. Otherwise the Court would not be able to conclude that the property derived from a serious crime as statutorily defined. And the accused would not know the offence from which the property derived.

Then there are sections 128 of the CP&EC and 42(2)(f)(ii) of the Constitution. They apply across all prosecutions. The latter is actually part of our fair trial regime. They require that an indictment gives particulars of the allegations against the accused. The latter goes so far as to oblige the State to inform the accused of the allegations against them with *sufficient particularity*. Would, in the light of the above two provisions the State get away with contending, like the English courts have allowed, that there is nothing in the law requiring them to specify the serious crime from which the proceeds of crime derive? The answer can only be in the negative. The accused would, if the answer were otherwise, go into trial virtually blindfolded. The trial would most certainly be against the spirit and intendment of section 42(2)(f)(ii). Our law, as it presently stands is in our judgment still very much as the law in England stood before POCA. The State[indictment] must specify the serious crime or class of serious crime from which the proceeds of crime derived. Like it did in the instant case.

The above notwithstanding we have no doubt that we, just like the English, do not always have to use direct evidence in order to prove that certain property is proceeds of crime. We can also resort to the circumstances of the case, including the manner in which the property was handled to do so. As long as the circumstantial evidence is such as to prove beyond reasonable doubt possession of property which the accused knew was the proceeds of a specifically alleged serious crime or class of serious crime as defined in section 2 above-mentioned. About circumstantial evidence generally see also **Nyamizinga v Rep** 1971-72 ALR Mal 258.

So would a resort to the circumstances of this case including the manner in which the money was handled have produced a different conclusion? We have to go back to the allegation against the appellant namely that he possessed the sum of K14439966.50 knowing the same to be proceeds of a serious crime to wit theft. Is

the evidence of the circumstances in which the cheque/money was handled such as to give rise to the irresistible inference that it could only have been derived from theft? In the alternative, and notwithstanding that this might be at variance with the actual allegation against the appellant, would the circumstances in which the cheque/money was handled be such as to give rise to the irresistible inference that the cheque/money could only have derived from ***any serious crime/offence***? If the answer were yes what would that offence be?

The proven facts are simple enough. The appellant gave a GOM cheque to PW3. PW3 deposited it in the Company's account and later drew the sum of K13900000.00 which he handed over to the appellant. There is no evidence of theft about the money or the cheque. There is none about the cheque having been improperly or irregularity originated, issued, collected, encashed or the cash itself having been irregularly obtained from the Company/bank by the appellant. Or of the cheque or the money having been surreptitiously handled which was the case in the English cases where the cash had traces of drugs in one matter and was delivered in a cloak and dagger fashion by persons with known criminal backgrounds in another. In our judgment the irresistible conclusion would never be that the money derived from theft. Or from any serious crime/offence as above defined.

The sum total of the above debate is that except for the need to specify a predicate offence or a class thereof there is not much difference between our and the English jurisdiction's approach to especially criminal property/proceeds of crime. In the instant case it matters not which way we look at the facts and the law. There is no evidence that the sum of K14439966.50 is proceeds of theft or any other serious crime. The conviction for money laundering is untenable in the absence of proof of the serious crime from which it arose.

Relief

We have set above this Court's powers on appeal. The appellant seeks that the conviction for money laundering be set aside and its sentence set aside. We will grant his request. The conviction for money laundering contrary to section 35(1) of the Act and the sentence imposed in respect thereof is also hereby set aside. The

appellant will be set at liberty unless there be some other lawful reason for not so doing.

THE SENTENCES

The appeal against the sentences is a non-issue the convictions against the appellant having been quashed.

RESTITUTION

The Trial Court ordered that the sum of K24179120.79 be restituted. And it was. Now that the convictions and sentences have been set aside should the money or any part of it be paid back to the appellant? We do not think so. It must be remembered that this same money was also used to restitute in respect of Kasamba's conviction. This appeal is not about Kasamba. His conviction and sentence remain valid until a contrary pronouncement is made thereon by a court of competent jurisdiction. Any restitution by him in relation to that conviction must therefore still stand. Repaying the money to the appellant will undo the Kasamba restitution. For that reason the money will remain as restitution for as long as the conviction against Kasamba remains in force.

We so order.

Dated this 23rd day of March 2018 at Blantyre.

R R MZIKAMNDA SC

JUSTICE OF APPEAL

L P CHIKOPA SC

JUSTICE OF APPEAL

A D KAMANGA SC

JUSTICE OF APPEAL